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No. 85-487

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

FORD MOTOR COMPANY, *et al.*,
Petitioners,

v.

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. de la RIGAUDIERE,
and DAVID C. SMITH,
Respondents

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals applied the proper burden of proof in reversing a summary judgment in favor of defendants entered by the District Court prior to trial in an antitrust case under Section 1 of the Sherman Act alleging a conspiracy among defendants to terminate the 22-year old franchise of a tractor dealership and to prevent the dealership from receiving a new franchise under its new owners, so as to eliminate or substantially decrease competition with a nearby "dealer development company" dealership controlled and partially owned by the franchisor, where those making these decisions on behalf of the franchisor were also senior officers and directors of the competing "dealer development company", where the Court of Appeals noted that "the franchisor itself in this case has a horizontal interest" and held that "To establish the existence of concerted action as a matter of fact, the plaintiff[s] must submit evidence from which a jury could reasonably infer that the defendants 'had a conscious commitment to a common scheme designed to achieve an unlawful objective' . . . or, in other words, 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement' ", and where the Court of Appeals found, after reviewing "with painstaking care" the "massive" record of 3,883 pages, including memoranda, affidavits, depositions, exhibits and other evidence offered by plaintiffs in opposition to the summary judgment motions, that "disputed issues of material fact as to motive, intent and conflict of interest permeate this record", that "there are numerous factual questions unresolved in this case", that defendants' "articulated business justification raises disputed issues of fact" which "we cannot reconcile . . . with the conduct of the defendants that fell short of 'proper business practices' ", that "We believe that the plaintiffs have submitted evidence which could lead a jury to believe that the decision to terminate was *not* made *unilaterally* on the part of [franchisor] Ford", that

the District Court "tilted the scale *against* plaintiffs by failing to factor into the overall conspiracy equation certain significant evidence that clearly favored the plaintiffs" and that "The plaintiffs present a plausible, albeit somewhat complex and dramatic, view of the facts, but the inferences which the plaintiffs draw from the facts are not so far-fetched that a trier of fact should not be allowed to consider them. When viewed in the light most favorable to the plaintiffs, the facts are susceptible of an inference of concerted action."

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Tunis Brothers Company, Inc. ("Tunis Brothers"),[1] Richard N. de la Rigaudiere ("de la Rigaudiere"), and David C. Smith ("Smith") respectfully request this Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, filed May 30, 1985, reversing the judgment of the District Court, is reported at 763 F.2d 1482 and is set forth in the Appendix to the Petition for a Writ of Certiorari at A-1 to A-41.

The opinion of the Third Circuit was written by the Honorable A. Leon Higginbotham, Jr., Circuit Judge, joined in by the Honorable Dickinson R. Debevoise, District Judge of the United States District Court for the District of New Jersey, sitting by designation. A dissenting opinion (A-42 to A-44) was written by the Honorable James Hunter, III, Circuit Judge.

The judgment of the Third Circuit, dated May 30, 1985, appears in Respondents' Appendix (RA-1 to RA-2) at the end of this Brief in Opposition.

A petition for rehearing filed by defendants/appellees in the Court of Appeals (the petitioners in this Court) was denied by the Third Circuit in an order filed June 24, 1985 (see A-45 and A-46), signed on behalf of the Court by Circuit Judge Higginbotham. The petition for rehearing ("with a suggestion of rehearing *en banc*") was considered by eleven Judges of the Third Circuit (Chief Judge Aldisert, former Chief Judge Seitz, and Circuit Judges Gibbons, Hunter, Weis, Garth, Higginbotham,

1. Respondent Tunis Brothers Company, Inc., a Pennsylvania corporation, has no parent company, no subsidiary and no affiliate. Tunis Brothers is wholly owned by respondents de la Rigaudiere and Smith. This statement is made pursuant to Rule 28.1.

Sloviter, Becker, Stapleton and Mansmann) and by District Judge Debevoise. The order denying the petition for rehearing records (A-46) only three dissenting votes from these twelve Judges, stating: "Judge Hunter would grant rehearing for the reasons expressed in his dissent, Judge Weis would grant rehearing, and Judge Garth would grant Ford Motor Company's petition for rehearing."

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, dated May 7, 1984, granting summary judgment in favor of the defendants (the petitioners here) is reported at 587 F.Supp. 267 and appears in petitioners' Supplemental Appendix at A-47 to A-62.

STATUTORY PROVISIONS INVOLVED

Respondents brought this antitrust action[2] against petitioners/defendants for treble damages, costs and attorney's fees for injuries to their business and property, pursuant to Section 4 of the Clayton Act (15 U.S.C. §15)[3] by reason of defendants' alleged violations of Section 1 of the Sherman Act (15 U.S.C. §1).[4]

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2. Count V of respondents' Complaint alleges tort liability under common law based on fraud and other tortious conduct. Count VI alleges contract liability on the part of the defendants at common law. The District Court dismissed these pendent state law claims without prejudice. A-61 and A-62. The Third Circuit reversed, reinstated Counts V and VI, and remanded the case for trial on all counts. A-41, RA-1 and RA-2.

3. Section 4 of the Clayton Act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

4. Section 1 of the Sherman Act provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States,

STATEMENT OF THE CASE

The very best statement of the case (as well as a good reason why this Court should deny the petition for certiorari) is the magnificent opinion of the Third Circuit Court of Appeals (A-1 to A-41), written by Circuit Judge Higginbotham, which the petitioners ask this Court to review and reverse.

In a classic opinion of clarity, persuasive reasoning and judicial decisiveness, Judge Higginbotham concisely but carefully summarizes the facts of this antitrust litigation, analyzes the legal and factual issues presented by the summary judgment motions of defendants/petitioners, reviews the applicable principles of law, evaluates the facts, and concludes that the District Court erred in granting summary judgment. In the words (A-10 to A-11) of the Third Circuit through Judge Higginbotham:

> Although we recognize that summary judgments are somewhat disfavored in antitrust cases, especially when motive or intent is at issue . . . they are not automatically precluded in antitrust litigation, if otherwise justified. . . Therefore, we have, with painstaking care, reviewed this massive 3,712 page record to ascertain whether it does or does not have the quantum of evidence required to sustain the district court's grant of summary judgment on behalf of the defendants as to Counts I through IV. The critical inquiry is: did the district court err in concluding that there is no genuine issue as to any

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or with foreign nations, is declared to be illegal. . . ."

Respondents' antitrust claims under Sections 7 and 14 of the Clayton Act (15 U.S.C. §§18, 24) were dismissed by the District Court's order granting in part and denying in part defendants' motions to dismiss. *Tunis Brothers Company, Inc. v. Ford Motor Company*, No. 82-5557 (E.D. Pa. June 22, 1983). No appeal was taken from that dismissal and these statutory provisions are not involved here.

material fact and that the moving party is entitled to judgment as a matter of law? . . .

We believe that, in evaluating the evidence contained in this veritable mountain of briefs and appendices, the trial judge, unintentionally of course, tilted the scale *against* plaintiffs by failing to factor into the overall conspiracy equation certain significant evidence that clearly favored the plaintiffs. Therefore, we reverse the entry of summary judgment as to Counts I, III and IV. As to Count II, we also reverse the judgment of the district court, again for the reason that evidence favoring the plaintiffs was not taken into account as to the improper use of the franchise agreement.

Our review of the dismissal of plaintiffs' pendent state claims is for an abuse of discretion. In light of our disposition of the federal claims, we reinstate Counts V and VI and remand this matter for trial.

Later in its opinion (A-24), following a factual analysis, the Third Circuit stated:

On the basis of the foregoing examination of the summary judgment record, we believe that there are numerous factual questions unresolved in this case. Issues of material fact need not be resolved conclusively in favor of the party opposing summary judgment: it is enough for the opposing party to show that sufficient evidence supporting some factual dispute requires a judge or jury at trial to resolve the parties' differing versions of the truth. . . . The plaintiffs present a plausible, albeit somewhat complex and dramatic, view of the facts, but the inferences which the plaintiffs draw from the facts are not so far-fetched that a trier of fact should not be allowed to consider them. When viewed in the light most favorable to the plaintiffs, the facts are susceptible of an inference of concerted action.

At another point in its opinion (A-29), the Court of Appeals stated: "We believe that the plaintiffs have submitted evidence which could lead a jury to believe that the decision to terminate was *not* made *unilaterally* on the part of Ford."

At the end of its analysis of plaintiffs' antitrust claims, the Third Circuit emphasized: "*We reiterate: disputed issues of material fact as to motive, intent and conflict of interest permeate this record*" (A-41) (Emphasis added.)

Plaintiff Tunis Brothers Company, Inc., under the ownership of Richard M. Tunis and his wife Isabelle, was a profitable tractor dealer in Kennett Square, Pennsylvania, the "Mushroom Capital of the World", under a franchise agreement with Ford Motor Company for 22 years from 1959 until Ford terminated its franchise in April 1981 after Tunis Brothers was sold in March 1981 to plaintiff Richard N. de La Rigaudiere, nephew and employee of Mr. and Mrs. Tunis, and his friend, plaintiff David C. Smith. Ford then refused to give a new franchise to Tunis Brothers and its new owners.

In December 1982 the plaintiffs commenced this federal antitrust action (with pendent tort and contract claims under common law) against defendants Ford Motor Company ("Ford"), Ford Motor Credit Company ("Ford Credit"), Wenner Ford Tractor, Inc. ("Wenner Ford"), John S. Wenner ("Wenner"), Eugene W. Fraher ("Fraher"), E. S. Hasel ("Hasel"), John Watson ("Watson"), Hugh Nickel ("Nickel"), Douglas N. Crawford ("Crawford") and Kenneth R. Harris ("Harris").

Alleging violations of Section 1 of the Sherman Act (15 U.S.C. §1), and pursuant to Section 4 of the Clayton Act (15 U.S.C. §15), the plaintiffs claim injuries to their business and property in the amount of $7,724,357 and seek treble damages from the defendants in the amount of $23,173,071.

Plaintiffs allege that the corporate and individual defendants conspired (1) to terminate the authorized Ford

tractor dealership of plaintiff Tunis Brothers, and further conspired (2) to deny and refuse to give a new Ford tractor franchise to Tunis Brothers and its new owners, de la Rigaudiere and Smith, in Kennett Square, to eliminate or substantially decrease competition with Wenner Ford, a Ford owned and controlled "dealer development" dealership located 11 miles away, all in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act. Plaintiffs' profitable tractor business was thereby destroyed. Fraud and trickery by Ford and some of its employees is alleged. This termination and refusal involved a conspiracy in which all of the defendants participated.[5]

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5. The Complaint consists of six counts. Counts I, II, III and IV allege violations of Section 1 of the Sherman Act. Counts V and VI allege pendent state law claims. Counts I, III and IV allege the conspiracy. Count II alleges that the most recent franchise agreement between Ford and Tunis Brothers was a "contract" in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act which Ford, aided and abetted by the other defendants, used improperly to deny transfer of the franchise to de la Rigaudiere and Smith in furtherance of defendants' illegal objectives.

Count I alleges that Ford's refusal to consent to the transfer of the Tunis Brothers franchise to new qualified owners, its refusal to approve plaintiffs' application for a franchise in Kennett Square, and its termination of Tunis Brothers' dealership and franchise, were *not only pursuant to a conspiracy* among all the defendants but were all *in furtherance of an illegal horizontal territorial restriction* by Ford in a situation where *Ford itself was in a horizontal relationship with Tunis Brothers*, occupying the *dual role of both franchisor and competitor*, by reason of Ford's stock and investment interest in defendant Wenner Ford. Therefore, Count I claims that said conspiracy and actions were not only in unreasonable restraint of trade but were illegal *per se*.

Count III incorporates the allegations of Count I but adds that "Said franchise agreement and the acts, representations, statements, conduct and conspiracy of defendants complained of herein included *dirty business tricks and unfair business dealing* on the part of Ford and the other defendants with respect to the plaintiffs, and each of them, in furtherance of defendants' illegal antitrust objectives and their unreasonable restraint of trade and in violation of

Defendants' answers denied all of plaintiffs' material allegations.

The parties engaged in some seven months of discovery involving the production of thousands of papers, the deposition of all plaintiffs and defendants as well as others covering 2,634 deposition pages, plus detailed interrogatories and answers. On November 30, 1983, thirty days after the discovery period ended and the day this case was placed on the trial judge's active jury trial

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Section 1 of the Sherman Act". The cause of action alleged in Count III constitutes *both* a *per se* and a *rule of reason* violation.

Count IV alleges facts constituting an unreasonable restraint of trade, within the meaning of *the rule of reason*, in violation of Section 1 of the Sherman Act. Count IV alleges *injury to competition*, contending that "Said franchise agreement and the acts, representations, statements, conduct and conspiracy of defendants complained of herein, leading to, making possible, in furtherance of, and resulting in the termination of the Ford dealer franchise of plaintiff Tunis Brothers and the refusal by Ford to consent to the transfer of said franchise to plaintiffs [de la] Rigaudiere and Smith or to grant them a new dealer franchise at the location of Tunis Brothers *eliminated intraband competition* in the sale and service of Ford products in which Tunis Brothers had been engaged under its franchise agreement and since 1959 in the marketplace of Tunis Brothers [the Kennett Square area] and in the marketplace of defendant Wenner Ford Tractor, Inc., eliminating Tunis Brothers and its new owners as a competitor of Wenner Ford, in which Ford had an investment interest." Court IV further alleged that "*No inter-brand competition* of any significance or consequence *was promoted* by such elimination of intraband competition primarily because of the *dominant position of Ford* and its tractors and agricultural equipment and replacement parts, and the overwhelming demand therefor in plaintiffs' marketplace", as evidenced by plaintiffs' lack of success subsequently in trying to sell another brand (Allis-Chalmers) in competition with Ford's Products sold by Wenner Ford. Count IV concludes that "The completely *anticompetitive effect on intraband competition* of defendants' acts, representations, statements, conduct and conspiracy and of said termination and refusal by Ford, *without* any significant *pro-competitive effect on interbrand competition*, constituted an unreasonable restraint of trade, within the meaning of the rule of reason, in violation of Section 1 of the Sherman Act."

list, the defendants filed motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, with supporting memoranda, affidavits, depositions and exhibits (A200-825)[6] seeking summary judgment against plaintiffs on all counts based on what they described as "uncontroverted material facts and applicable principles of law" (A201) arguing that "there are no facts showing conspiracy or injury to competition" (A203ff).

In response, plaintiffs filed and submitted to the District Court a brief, memoranda, affidavits, depositions, exhibits and other evidence in opposition to defendants' summary judgment motions.[7]

Following oral argument and without a trial (plaintiffs had requested a jury trial), the District Court

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6. References herein to a number preceded by the letter "A" (without a hyphen (-) separating the letter and number) are references to the 10-volume Appendix to "Brief of Appellants" filed with the Court of Appeals by the respondents. This Appendix, consisting of 3,883 pages, is what Judge Higginbotham referred to in his opinion for the Third Circuit as "this massive 3,712 page record" (A-11 of the Appendix to the Petition for a Writ of Certiorari). [The erroneous reference to the number of pages in the Appendix record is understandable since the final exhibit offered into evidence by plaintiffs and included in the Appendix, namely "Corporate Records and Minute Book of Wenner Ford Tractor, Inc.", is listed in the Table of Contents of the Appendix at page A3712. This exhibit consists of 171 pages and continues to page A3883.]

7. Volumes IV (A900-1374), VI (A1500-1964), VII (A1965-2463), VIII (A2464-2971), IX (A2972-3427) and X (A3428-3883) of the Appendix are devoted exclusively to plaintiffs' submissions. The Complaint and other pleadings are set forth in Volume I and certain letter memoranda to the trial judge from plaintiffs' counsel appear in Volume V. Plaintiffs submitted affidavits of plaintiffs de la Rigaudiere and Smith, and affidavits of Richard M. Tunis, Isabelle de la R. Tunis, and Arnold R. Ginsburg. In addition, plaintiffs filed with the District Court in opposition to defendants' summary judgment motions the complete deposition transcripts of depositions taken by defendants of plaintiffs de la Rigaudiere and Smith, of Richard M. Tunis, and of Isabelle de la R. Tunis, as well as pages from depositions taken by plaintiffs of defendants and others. Some 176 exhibits were also submitted by plaintiffs in opposition.

granted defendants' motions for summary judgment on plaintiffs' federal antitrust claims and dismissed plaintiffs' pendent state law claims without prejudice. In its Memorandum and Order of May 7, 1984 (A-47 to A-62) the District Court held that "there is no evidence of a conspiracy under section 1 of the Sherman Act" and, therefore, "there is no genuine issue of material fact and all defendants are entitled to judgment as a matter of law on Counts I, III and IV" (A-59). The District Court also held that "the franchise agreement, on its face, does not violate section 1 of the Sherman Act", that "there are no facts which show that Ford improperly used the franchise agreement to deny transfer of the Ford franchise to plaintiffs de la Rigaudiere and Smith", and "Accordingly, defendants' motions for summary judgment as to Count II will be granted" (A-60 to A-61). Finally, the District Court dismissed Counts V and VI, the state law pendent claims, without prejudice (A-61).

On June 4, 1984 the plaintiffs noticed their appeal to the United States Court of Appeals for the Third Circuit from this Order of May 7, 1984 of the United States District Court for the Eastern District of Pennsylvania and from the final Judgment entered May 8, 1984 in accordance with its Memorandum and Order (A10, A168).

As the Third Circuit noted in its Opinion (A-9 to A-10):

> Although Tunis Brothers, de la Rigaudiere and Smith challenge the district court's ruling as to the validity of the franchise agreement and the dismissal of the state claims, they have launched their major offensive against the district court's holding with respect to the entry of summary judgment on the conspiracy charge. [*Footnote:* Specifically, plaintiffs argue first and foremost that the district court erred in holding that there is no evidence of a conspiracy under section 1 of the Sherman Act. Second, they argue that the district court erred in holding that the franchise agreement does not violate section 1 of the

Sherman Act. Finally, they argue that the district court abused its discretion in dismissing the pendent state law claims.] They strongly take issue with the district court's evaluation of the material facts and staunchly maintain that it failed to examine *all* of the admissible evidence, direct and circumstantial, which they presented in opposition to the defendants' Rule 56 motions. The plaintiffs contend that the district court did not properly determine *what* legitimate inferences could be drawn as to the ultimate facts in issue. [*Footnote:* Even if there is no dispute as to evidentiary facts, summary judgment is inappropriate if there is a dispute as to conclusions to be drawn from the facts. Magill v. Gulf & Western Industries, 736 F.2d 976 (4th Cir. 1984).] They assail the trial court's conclusions by asking: Where are the facts?[8]

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8. Plaintiffs' "Brief of Appellants" in the Court of Appeals stated in part (pp. 57-8): "This is a *shocking illustration* of a trial court disposing summarily of an antitrust conspiracy case without a jury trial (which would have been comparatively long) by entering summary judgment against plaintiffs on the ground that 'there is no evidence of a conspiracy' (A163), where the trial court *not only* disregarded the warnings of the Supreme Court and this Court of Appeals 'against fragmentizing or compartmentalizing the evidence in an antitrust conspiracy case' [*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 305 (3d Cir. 1983)] and the correlative mandate to engage in the 'process of examining *all* of the admissible evidence, direct and circumstantial, in order to determine what legitimate inferences could be drawn as to the ultimate facts in issue' [723 F.2d at 305], but where *the trial court compounded its error by flagrantly ignoring and disregarding so completely the relevant and material evidence presented* to the trial court *by the plaintiffs* in opposition to the Rule 56 motions. . . . [U]pon reading the District Court's factually bare Memorandum and Order (A147-167) and comparing it with the factual record in our Appendix of ten volumes and 3,883 pages . . . this Court of Appeals may well ask the court below: '*Where are the facts?*' Where are the

Argument on appeal was heard on January 15, 1985 by a Third Circuit panel consisting of Circuit Judges Hunter and Higginbotham and District Judge Debevoise, of the United States District Court for the District of New Jersey, sitting by designation. On May 30, 1985, the Court of Appeals filed its Opinion (A-1 to A-41) and entered its Judgment (RA-1 to RA-2) reversing the District Court and remanding for further proceedings (A-3). The Court concluded: "judgment of the district court will be reversed as to Counts I, II, III and IV. Counts V and VI will be reinstated and this case remanded for trial on all counts" (A-41).[9] The opinion of the Third Circuit was written by Judge Higginbotham and joined in by Judge Debevoise. Judge Hunter wrote a dissenting opinion (A-42 to A-44).

A petition for rehearing filed by defendants/appellees was denied by the Third Circuit in an order filed June 24, 1985 (A-45 and A-46) following consideration by eleven judges of the Third Circuit and by District Judge Debevois. The order denying the petition for rehearing records (A-46) only three dissenting votes from these twelve Judges, stating: "Judge Hunter would grant rehearing for the reasons expressed in his dissent. Judge Weis would grant rehearing, and Judge Garth would grant Ford Motor Company's petition for rehearing."

Defendant Wenner Ford Tractor, Inc., located in Concordville, Pennsylvania, about 11 miles east of Kennett Square, was the authorized Ford tractor dealer nearest Tunis Brothers. Wenner Ford is a Ford Dealer

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facts which plaintiffs presented to the District Court in their pleadings, depositions, affidavits, answers to interrogatories, and exhibits? Where are the facts which plaintiffs presented, analyzed, discussed and argued in their briefs and memoranda . . . in the court below? *Where are the facts?*"

9. The Court of Appeals "remanded, along with the conspiracy issue, for further consideration and fact-finding" the issue of adverse impact on competition since the District Court had not reached that question (A-13, n.13).

Development Company, established by Ford in November 1979, in which defendant Ford Motor Company owns all of the voting preferred stock representing 79% of the equity stock. Defendant John S. Wenner owns all of the non-voting common stock, representing 21% of the equity stock. Wenner operates Wenner Ford as its president and chief executive officer pursuant to a Dealer Development Agreement and a Management Agreement (A-5). Though Ford's Dealer Development Program contemplates that Wenner will buy out Ford's investment within a reasonable time and become a private dealer (A-5, n. 6), documentary evidence offered by plaintiffs reflect Ford's concern that it receive a certain return on its $187,500 preferred stock investment and full redemption thereof, plus interest on its $187,500 loan to Wenner Ford and repayment thereof, before Ford's ownership and domination of Wenner Ford would ever terminate. Ford Motor Company has always had a vested interest in Wenner Ford's financial success.

Ford has always been in complete control of the management and operation of Wenner Ford through its board of directors and officers (all of whom were Ford employees except for Wenner) and through the very tight control and restriction of Wenner Ford (and Wenner's operation thereof) reserved to and exercised by Ford through agreements between Ford, Wenner Ford and Wenner.

At all times Wenner Ford's board has consisted of three directors, one of whom has always been Wenner and the other two have always been employees of Ford Motor Company, one of whom has always been either defendant Eugene W. Fraher or defendant E. S. Hasel, the two who decided on behalf of Ford to terminate Tunis Brothers and refuse plaintiffs a new franchise. The Se-

nior Vice President of Wenner Ford has always been either Fraher or Hasel.[10]

John S. Wenner was employed by Ford Motor Company's Tractor Operations in Michigan from 1973 to 1977 as Parts Operations Manager at an annual salary of $52,000 plus bonuses in 1977 (A3240, 3245). In June 1977 Wenner acquired a Ford tractor dealership in Concordville which he operated as a private dealership. Though he made some dramatic gains in sales volume, a severe cash shortage soon forced him to seek help from Ford's management personnel, some of whom he apparently knew well from his employment years with Ford.

10. Fraher served as a director of Wenner Ford and as its Senior Vice President from November 5, 1979 (upon Wenner Ford's incorporation) to January 5, 1981, and again since January 4, 1982. Hasel served as a director and Senior Vice President of Wenner Ford from January 5, 1981 to Janury 4, 1982. They were not simply "nominal" directors or officers of Wenner Ford as Judge Hunter's dissenting opinion (A-43) suggests. A review of Wenner Ford's corporate minutes and resolutions signed by *Fraher* as one of Wenner Ford's three directors discloses that he participated in corporate decisions of Wenner Ford with respect to its specific credit line limits (A3814), election of certain officers (A3816-7), purchase by Wenner Ford of a $5,300 Rollback truck bed (A3820), purchase, financing and/or trade of nine specific trucks at specified prices by Wenner Ford (A3821-7), election of officers (A3833), purchase of a Ford truck for $13,949.71 (A3835), purchase of a machine and cabinet for $1,566.74 (A3836), adoption of Standards of Corporate Conduct (A3837), purchase of a Ford van for $3,198.35 (A3838), authorization to John S. Wenner to spend $1,200.85 to upgrade lighting in the parts and service areas (A3840), authorization to Wenner to borrow $25,000 from a bank as short term working capital (A3841), purchase of a new truck for $11,342 and sale of used vehicles for a total of $2,450 (A3842), purchase of a new automobile for $7,102.72 (A3843), election of an Assistant Secretary (A3844), and election of Hasel as a director and Vice President (A3846). A review of Wenner Ford's corporate minutes and resolutions signed by *Hasel* as one of Wenner Ford's three directors discloses that he participated in corporate decisions of Wenner Ford with respect to the sale of certain mowers, cabs and trailers (A3851), a salary adjustment for Wenner (A3852), the purchase of a used Ford Pinto for $3,286 (A3853), the election of officers (A3859-60, A3861), and the reelection of Fraher (A3863).

Among the Ford employees who tried to help Wenner overcome his dealership troubles were defendants John Watson and Hugh Nickel. Ultimately, they and defendant Fraher, who was then Ford's District Manager, helped Wenner convert his private dealership into a Ford Dealer Development Company. H. W. Stoneback, Manager of the Philadelphia Branch of Ford Motor Credit Company, cooperated with Nickel in securing the necessary credit for Wenner Ford.

When plaintiffs de la Rigaudiere and Smith began negotiating with Mr. and Mrs. Tunis in 1980 to purchase Tunis Brothers, they met with defendant Watson, then Ford's Zone Manager for an area including Kennett Square and Concordville, to tell him of their plans and of their desire to be Ford franchised dealers at Tunis Brothers in Kennett Square. With Wenner eavesdropping, as he and Watson apparently prearranged (all of which they deny), Watson told de la Rigaudiere and Smith that he liked the idea of their being Ford dealers but *not* in Kennett Square. He wanted them to move 15 miles west to the Cochranville area. Watson told them that he no longer wanted a dealer in Kennett Square. Watson admits (A116) that "he told them of Ford's plans to eliminate its Kennett Square tractor dealership as soon as Richard Tunis decided to leave the business of running Tunis Brothers Company, Inc."

Watson told them, according to de la Rigaudiere, that "he thought that Mr. Wenner could do a better job than Tunis Brothers", "because he was so close to Tunis Brothers, he could take over that territory" (A1567), that "he no longer wanted a dealership in the Kennett Square area because this territory belonged to Wenner Ford" (A1917), that "Kennett Square territory was to belong to Wenner Ford Tractor at the end of Tunis' dealership . . . This territory belonged to Wenner . . . . " (A1919). Smith testified that Watson told him and de la Rigaudiere that

"Kennett Square was going to be John Wenner's territory" (A2142, A2377). Watson denied making these statements (A-18).

Following his meeting with plaintiffs, Watson wrote to his superiors that "These two young men appear to be very well qualified to represent us in this trade area", referring to Oxford-Cochranville, not Kennett Square (A-18; A2779-80).

Believing that Wenner and Watson had been collaborating, de la Rigaudiere and Smith decided to go over their heads and meet with defendant Fraher, who was Ford's District Manager and Watson's superior. When they met in June 1980, plaintiffs did not know, and Fraher did not tell them that he was then a Director and the Senior Vice President of Wenner Ford and that Ford controlled and had a substantial stock interest in Wenner Ford (A-19). Plaintiffs testified that Fraher agreed with what Watson had previously told them. Fraher said that "Kennett Square was going to be Wenner's territory" and that Fraher "didn't want his dealers competing with each other" (A2149). Fraher said that "Kennett Square territory belonged to Mr. Wenner because Mr. Wenner was doing such a fine job" (A1935). Fraher said that Wenner Ford "would take over the Ford franchise in Kennett Square or take over the territory in Kennett Square". He said this "a number of times" because "He wanted us to make sure that we understood that this territory belonged to Wenner Ford eventually . . . [after] my uncle [Tunis] sold or we would take over" (A1936-7).

Fraher told plaintiffs that he wanted them to establish a Ford dealership either in Cochranville or Oxford, rather than in Kennett Square. He liked the idea of plaintiffs being Ford dealers, but not in Kennett Square (A1579). Fraher later testified: "I really like those two guys, and I wanted them as a dealership. But I wanted them in . . . Cochranville" (A1337).

Finally, as a compromise, Fraher agreed and assured plaintiffs at this meeting that they could have the Ford

tractor dealership at Tunis Brothers in Kennett Square for two or three years at the end of which time plaintiffs would move to Cochranville or Oxford. Fraher stated that plaintiffs could use the Tunis Brothers location in Kennett Square for two or three years to build up the equity they would need to establish a complete dealership in the Cochranville-Oxford area and, at the end of that time, plaintiffs could either sell the Kennett Square location or keep it to sell their hardware and other things, but sell Ford tractors only out of the Cochranville-Oxford location and dealership (A1579-80, A1935-40, A2145-6, A2148-9). At the end of their meeting, Fraher gave de la Rigaudiere and Smith dealer applications and told them to apprise him of the progress of their sale negotiations with Mr. Tunis (A-20).

Plaintiffs continued their purchase negotiations, reported on their progress to Fraher by letter in September 1980 (A-20) and, after a low purchase price of $450,000 had been negotiated with favorable mortgage financing, an Agreement of Sale for Tunis Brothers was signed by Mr. and Mrs. Tunis, de la Rigaudiere and Smith in December 1980 (A2787-9). In January 1981 de la Rigaudiere wrote a letter to Fraher (A2857-8) with "the proposal that you requested which presents our goals and ideas concerning the Ford franchise and an eventual move to the Cochranville area", reporting also that he and Smith expected to become the sole owners and managers of Tunis Brothers within 60 days. This letter explained how plaintiffs planned to develop sales in the area between Kennett Square and Cochranville while they operated the Tunis Brothers dealership in Kennett Square. With this letter de la Rigaudiere enclosed his and Smith's personal financial statements, a copy of the Agreement of Sale, plaintiffs' business plan, a copy of mortgage financing approval from the local Industrial Development Authority, and a 54-page explanatory document (A-20 to A-21; A2790-2846). Plaintiffs believed that this package of material to Fraher "was a pretty good

summary of what we planned to do with the business, the business structure" and included "the business plan that Fraher had been talking about" (A2155-6). Their letter to Fraher concluded: "If you have any questions or comments, please contact us in care of Tunis Brothers." The same package of material was mailed by de la Rigaudiere in January 1981 to defendant Douglas N. Crawford, who had succeeded Watson as Ford's Zone Manager (A-21, A1666-7).

Plaintiffs never received any reply from Fraher or anyone else to the letter and material de la Rigaudiere mailed him and Crawford in January 1981. However, the morning of March 3, 1981 de la Rigaudiere received a telephone call from Crawford saying that he and Hugh Nickel from Ford Motor Company in Michigan would be coming to Tunis Brothers that afternoon to take plaintiffs' application. In that telephone conversation Crawford said "that Mr. Fraher was sending him" (A1668). Crawford testified (A1292-4) that it was Fraher who telephoned him, instructed him to pick up Nickel at the airport, and told him to go to Tunis Brothers and elsewhere with Nickel to take several dealer applications (A1292-4). Crawford further testified (A1303-4) that Hugh Nickel told plaintiffs at the meeting on March 3, 1981 at Tunis Brother in Crawford's presence that Fraher had "requested" and "instructed" Nickel to come and take their application for a franchise dealership. Fraher testified (A1338-1341) that he did not call Crawford. Defendant Nickel was then a Dealer Placement Representative in the Northern Region of Ford Tractor Operations, with offices in Troy, Michigan, where defendant Fraher was then Assistant Regional Manager.

At this March 1981 meeting at Tunis Brothers, attended by Mr. and Mrs. Tunis, de la Rigaudiere, Smith, Nickel and Crawford, after inquiring and being told that the Tunis Brothers sale would be settled within two or three weeks, Nickel stated that the first order of business

was for Tunis to sign an *unconditional letter of resignation* and termination notice on behalf of Tunis Brothers as a Ford dealer, to be typed on Tunis Brothers stationery in accordance with a form letter Nickel presented, immediately after settlement, and send it to Nickel at Ford Motor Company. Nickel stated that this was required by Ford before it could act on the new application of de la Rigaudiere and Smith for them to operate Tunis Brothers as a Ford dealership in Kennett Square. Nickel emphasized that this resignation and termination letter would *not* be acted upon or made effective *until* the application of the new owners of Tunis Brothers (de la Rigaudiere and Smith) for a Ford franchise was *approved*, which, Nickel assured and reassured them, *would be approved*. In the meantime, until such approval, Nickel stated, this resignation and termination letter would be "*kept in a drawer*" and *not* acted upon or made effective. [See A-21 to A-22; and deposition testimony of de la Rigaudiere (A1950-4, A1673-5), Smith (A2158-62), Isabelle de la R. Tunis (A2661-2) and Richard M. Tunis (A2556-9).] Nickel told plaintiffs that Ford Motor Credit Company (as well as Ford Motor Company) would approve them (A1675).

After discussing the unconditional resignation he wanted Mr. Tunis to sign, Nickel gave plaintiffs blank application forms he asked them to sign for Ford Motor Company and Ford Motor Credit Company, which they did. Nickel stated that he would have the forms typed up in his office in Michigan and then return them to plaintiffs for their review before submitting them. Plaintiffs never saw these papers again before they were submitted. Subsequently, after their applications had been rejected, plaintiffs discovered that Nickel had, in completing the applications signed by plaintiffs in blank, supplied information that plaintiffs were investing in the Tunis Brothers business only $2,500 each whereas in fact, as they had informed Nickel at their March 3, 1981 meeting when they signed these papers in blank and

gave him the information to type up, they were each putting $25,000 into the business at settlement (A-22, A-23, A-34) (A1954-62, A2159-60).

During their meeting on March 3, 1981, neither Nickel nor Crawford mentioned any move to Cochranville or Oxford or any time limit on the franchise in Kennett Square. Nickel assured plaintiffs that they were going to be Ford tractor dealers in Kennett Square (A1959-62, A2162). In his Affidavit (A1215-16) de la Rigaudiere stated: "We talked only about Tunis Brothers in Kennett Square. Our application was for a Ford tractor dealership in Kennett Square. Therefore, it was very clear to me not only that Mr. Fraher was confirming his assurance to us of June 1980 that we would be approved as Ford tractor dealers at Tunis Brothers in Kennett Square but also that Mr. Fraher was not now placing any time limit as to when we would have to move to Cochranville. I thought that he was so impressed with our business plans that he had decided to let us stay in Kennett Square indefinitely."

Mr. and Mrs. Tunis, de la Rigaudiere and Smith all made it clear in their respective affidavits that none of them would have signed their Agreement of Sale or, having signed it, would have consummated the purchase and sale of Tunis Brothers except in reliance upon Ford's assurances given by Fraher in June 1980 and by Nickel in March 1981 that plaintiffs would be given a Ford tractor franchise at Tunis Brothers in Kennett Square. They all relied on those assurances (A1225-29, A1213-19, A1188-95).

In reliance thereon, plaintiffs and Mr. and Mrs. Tunis closed the purchase and sale of Tunis Brothers on March 16, 1981 and Mr. Tunis signed an *unconditional* resignation and termination notice on behalf of Tunis Brothers, dated March 17, 1981, in the form prescribed by Nickel on behalf of Ford (A2929, A-23).

Despite the assurances he gave plaintiffs that their dealer applications would be approved, Hugh Nickel

submitted a negative written report to his superiors concerning his meeting with plaintiffs and their application (A2860-1), stating that he had met with de la Rigaudiere and Smith to take their dealer application, that the Kennett Square location was "too close to Concordville" [Wenner Ford] and that "I do not feel that [Smith and de la Rigaudiere] are qualified as businessmen nor is their net worth or financial strength adequate enough to qualify for a line of credit." Nickel's "recommendation" was to "terminate the [Tunis Brothers] franchise . . . especially if FMCC [Ford Credit] refuses a line of credit" (A-22, A2860-1).

Upon receipt of Tunis' "resignation" (A2929) defendant Nickel handprinted a request (A2972, A1018) that the Market Representation Manager "accept dealer resignation" of Tunis Brothers "*immediately*". This request was then typed (A2980), dated 3/23/81, and signed by defendant Eugene W. Fraher. As Fraher was authorized to do, he signed the name of defendant E. S. Hasel, the Regional Manager, to this request for *immediate* acceptance of Tunis Brothers' "resignation" (A-23, A1019, A1343-4). By letter dated March 23, 1981 (A2973), addressed to Mr. Tunis, receipt of the "resignation" was acknowledged by Fraher, who signed Hasel's name to the letter.

Without first sending plaintiffs for their review the applications he had filled out after they signed in blank, Nickel sent these applications, with false investment information he had inserted, to Howard W. Stoneback, Jr., Philadelphia Branch Manager of Ford Motor Credit Company. When Stoneback telephoned Nickel about the small $5,000 investment by de la Rigaudiere and Smith, this false information was immediately confirmed by Nickel who also told Stoneback that he and his associates at Ford Tractor were "*not* confident" about plaintiffs. Nickel "also implied that [Ford Tractor] did *not* want the deal approved" and that transfer of Tunis Brothers ownership without Ford Tractor's approval

"was reason for the franchise to be terminated" (A3112). Thereupon, Stoneback recommended that Ford Credit should reject plaintiffs' application and he telephoned this recommendation to defendant Harris, who was Nickel's superior (A1330). Harris then arranged for the immediate acceptance of Tunis Brothers' "resignation" (A1330-1). This was done immediately and Tunis Brothers' franchise was terminated effective April 2, 1981 (A2981).

When plaintiffs subsequently discovered that Tunis Brothers' franchise had been terminated and that their application had been rejected by Ford Credit because of the false financial information supplied by Nickel, they took steps to prepare a new application to Ford Credit which Harris helped process. Both Harris and his superior, W. L. Heck, Ford's Regional Marketing Manager, approved granting plaintiffs a franchise in Kennett Square. In a concurring memo, Heck wrote in part: "These people (Rigaudiere, Smith, Mr. & Mrs. Tunis) have completed all actions outlined by the N.E. District management [headed by Fraher] during 1980 as being required to change over the dealership and to meet the requirements necessary to secure the Ford sales agreement. . . . I can find no written commitment to *John Wenner* concerning this location. It was in no way part of the D.D. [Dealer Development] package. . . I believe we are bound to process the attached application . . . Tell *Wenner* in writing of our plan." [Emphasis added.] (A3069-83)

When Harris and Heck went to defendant Fraher on August 5, 1981 for his concurrence, *Fraher refused and vigorously opposed granting plaintiffs a Ford dealership in Kennett Square.* They then went into the office of Regional Manager E. S. Hasel who, after hearing the arguments of Harris and Heck in support of plaintiffs' application and the opposing arguments of Fraher, agreed with Fraher and made the decision to reject plaintiffs' second application for a franchise in Kennett

Square (A407-411, 360-2). On that date, August 5, 1981, Hasel was the Senior Vice President and a Director of Wenner Ford Tractor, Inc., a nearby competitor of Tunis Brothers. Prior to January 5, 1981 and beginning again on January 4, 1982, Fraher was the Senior Vice President and a Director of Wenner Ford.

Following this decision by Fraher and Hasel to reject plaintiffs' second application, Harris telephoned Ford Credit to advise that Ford Tractor was rejecting plaintiffs and withdrawing or rescinding their second credit application sent to Ford Credit on July 28, 1981. By letter dated August 7, 1981 (A3084), Hasel advised plaintiffs that "the Northern Region of Ford Tractor Operations has decided not to approve your application for a dealership in Kennett Square."

The conspiracies alleged by plaintiffs and the conspiratorial relationships of the various participants therein are well defined in the Third Circuit's Opinion (A-25ff.) and its excellent analysis of the liability of the co-conspirators. As the Court stated (A-25): "The plaintiffs take the position that Ford and Wenner Ford conspired with each other and with all of the individual defendants, both employees and non-employees; that all of the individual defendants conspired with each other; and that Ford Credit conspired with Wenner Ford and with all of the individual defendants. The only change in position on appeal is that plaintiffs no longer contend that Ford conspired with Ford Credit, its wholly-owned subsidiary."

In addition to Wenner Ford's obvious conspiracy with Ford through Fraher and Hasel, who were Senior Vice Presidents and Directors of Wenner Ford at the same time they were making management decisions for Ford, plaintiffs also contend that Wenner Ford was conspiring with Ford and with Ford Credit through Hugh Nickel and with Ford through Watson and Wenner.

The Court of Appeals correctly points out (A-27 to A-28) that "Plaintiffs allege that defendants John S.

Wenner, Eugene W. Fraher, Hugh Nickel, John Watson, Kenneth R. Harris, Douglas N. Crawford and E. S. Hasel conspired with their respective corporations and employers and fall within the exception to the general rule because each had an 'independent personal stake' in achieving the allegedly illegal objective of their respective corporations and the conspiracy". The independent personal stake and personal motivations of the individual defendants are summarized in note 22 (A-27 to 28) of the Court's Opinion.

REASONS FOR DENYING THE WRIT

This is not an ordinary "distributor termination" case. This is a factually complicated and confusing case, with keenly disputed issues of fact, involving franchise termination and application denials through dirty business tricks and unfair business dealing on the part of a franchisor and co-conspirators. This case was brought by defrauded applicants, not just "disappointed applicants". This case involves an alleged conspiracy between a franchisor and one of its "dealer development" companies conspiring through management employees of the franchisor who are also senior officers and directors of the dealer. This is a case where the Court of Appeals found that "disputed issues of material fact as to motive, intent and conflict of interest permeate this record". This is a case with a unique factual situation highly unlikely ever to arise again. This is a case clearly requiring the resolution of disputed factual issues by a jury after trial, not by a court in summary judgment proceedings. If the question presented by petitioners warrants the consideration of this Court in an appropriate case, this is certainly not that case.

The Court of Appeals in this case applied the correct standard for inferring an antitrust conspiracy in this kind of case, consistent with the decisions of this Court including *Monsanto Company v. Spray-Rite Service Corp.*,

104 S.Ct. 1464 (1984). The decision here of the Court of Appeals did not, as petitioners suggest, "deviate" from *Monsanto* or any other decision of this Court "to create a new standard of proof in Section 1 conspiracy cases." Petitioners have misconstrued *Monsanto*. In the event and to the extent that *Monsanto* established a stricter "standard of proof required to find a vertical price-fixing conspiracy in violation of Section 1 of the Sherman Act", that standard is not applicable in a conspiracy case where price-fixing is not involved, particularly on summary judgment motions prior to trial. If applicable here and to the extent relevant to the facts of this case, the Court of Appeals complied with such standard.

The facts and issues involved in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 105 S.Ct. 1863 (1985), now before this Court on writ of certiorari, are so different from what is involved in the present case that any decision in that case will not affect this case or the decision in the Court below. Accordingly, *Matsushita* is not a reason for granting certiorari here or for delaying any denial thereof.

In arguing that the decision of the Court of Appeals in this case created "a new standard of proof in Section 1 conspiracy cases", the Petition for a Writ of Certiorari (7-18) either ignores or misunderstands the Third Circuit's accurate statement of the applicable legal principles, its fine analysis of the legal and factual issues presented here, and its application of those legal principles to the facts. The Third Circuit's opinion (A-1 to A-41), written by a distinguished and highly regarded member of the federal appellate judiciary, reflects a full understanding of applicable legal principles, including the appropriate standard of proof, enunciated by this Court, and a very careful application of those principles to the rather unusual and complex factual situation presented in this case. We respectfully submit that Judge Higginbotham wrote a superb opinion with accurate statements of the law and correct conclusions in light of

the facts. There is no need for this Court to be burdened with a review of that decision, particularly in view of the unique and unusual facts presented here.

The Petition is highly selective in presenting the facts of this case and presents legal issues rather abstractly and certainly not in their full factual context. The "Question Presented" in the Petition (i) is *not* "expressed in the terms and circumstances of the case" as required by Rule 21.1(a) of this Court. The "Statement of the Case" in the Petition (2-7) does *not* contain "the facts material to the consideration of the questions presented" as required by Rule 21.1(g). We have tried to remedy those inadequacies by rephrasing in our Respondents' Brief in Opposition the "Question Presented" and by our "Statement of the Case". However, a reading of the Third Circuit's opinion provides the best answer in all respects to the Petition.

In connection with petitioners' contention (Pet. 7ff) that the Third Circuit's decision here "deviated from *Monsanto* to create a new standard of proof in Section 1 conspiracy cases", it is noteworthy that one of the eight Circuit Judges of the United States Court of Appeals for the Third Circuit who reviewed the Court's decision on petitioner's Petition for Rehearing (arguing, *inter alia*, that "Judge Higginbotham and Judge Debevoise had deviated from . . . *Monsanto* to create a different standard of proof in Section 1 conspiracy cases") *and who refused to vote for a rehearing* was Chief Judge Aldisert who wrote the *Sweeney* opinion and who was quoted by this Court with approval in *Monsanto* (104 S.Ct. 1464, at 1471), as follows:

> Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. *As Judge Aldisert has written*, the antitrust

> plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeney & Sons*, *supra*, at 111 . . . [Emphasis added.]

See also Note 5 of this Court's opinion in *Monsanto* (104 S.Ct. at 1468) referring to the standard of proof articulated in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110-111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)

If Chief Judge Aldisert thought that Judge Higginbotham's opinion deviated from anything that was relevant or applicable in *Monsanto*, it is reasonable to assume that he would have voted for a rehearing. He did not.

Though the Court of Appeals in this case applied the standard of proof enunciated by this Court in *Monsanto*, properly construed, it is important to note that the *Monsanto* standard is not necessarily applicable to a *non*-price conspiracy case (such as what we have here) and is not applicable to issues presented by Rule 56 summary judgment motions.

1. *Monsanto* is not a summary judgment decision. *Monsanto* deals only with the standard of proof for submitting a case to the jury *after* trial (on a motion for a directed verdict) or perhaps the standard to be applied in determining whether to set aside a verdict. *Monsanto* decides nothing with respect to issues presented on a motion for summary judgment. Indeed, no such issues were presented to this Court in *Monsanto*.

In *American Dermatologists' Medical Group, Inc. v. Collagen Corp.*, 595 F.Supp. 79, 82 (N.D. Ill. E.D. 1984), an antitrust case in which defendants' summary judgment motions were denied, the District Court held that this Court's decision in *Monsanto* "has less bearing on

defendants' summary judgment motions than they suggest." The Court stated in this connection (595 F.Supp. at 82):

> They also claim that the Supreme Court's recent decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984) requires that their motions for summary judgment be granted . . . We disagree . . . The Supreme Court's ruling in *Spray-Rite* has less bearing on defendants' summary judgment motions than they suggest. The Court announced the standard of proof in an antitrust conspiracy, holding that to permit the inference of conspiracy "there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Spray-Rite*, 104 S.Ct. at 1473. In opposing the motions for summary judgment, Frankel need not meet this standard of proof. Rather, he must only show that there is enough evidence so that the trier of fact *might* reasonably decide that he met this standard . . . Frankel has done this. As the Supreme Court observed in *Poller* [*Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962)], "It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is' " *Poller*, 368 U.S. at 472.

The District Court in *Collagen* further explained: "Unlike Frankel, the plaintiff in *Spray-Rite* was given an opportunity to present his entire case to a jury. Thus, the Court discussed the standard of proof which a plaintiff must satisfy in order to prevail *ultimately*, not to defeat

a motion for summary judgment." 595 F.Supp. at 82, note 2.[11]

2. This Court made it very clear at the outset of its *Monsanto* opinion (104 S.Ct. 1464, at 1466) that "This case presents a question as to the standard of proof required to find a vertical *price-fixing* conspiracy in violation of Section 1 of the Sherman Act." [Emphasis added.] In its opinion the Court emphasized the "important distinction in distributor-termination cases" between "concerted action to set prices and concerted action on nonprice restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement . . . The latter are judged under the rule of reason . . . [I]t is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages. On a claim of concerted *price-fixing*, the antitrust plaintiff must present evidence sufficient to carry its burden of proving there was such an agreement. If an inference of *such an agreement* may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded." (Emphasis added.) 104 S.Ct. 1464, at 1469-1470.

At the March 1984 meeting of the American Bar Association's Section of Antitrust Law, it was noted that in *Monsanto* this Court "did not set a standard to be applied to determining when *non*price restraints should be condemned." See 46 *Antitrust & Trade Regulation Report*

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11. One commentator has observed that "since Monsanto lost on evidence that seemed perfectly consistent with the hypothesis of independent action, it is obvious that the Court [in *Monsanto*] intended to give juries great latitude on this question. This means that defendants will also find it difficult to move directed verdicts or summary judgments on the conspiracy issue." Hutchinson, *The Supreme Court Review — 1984* (University of Chicago) at 122.

617, at 627 (March 29, 1984). The standard of proof established by this Court in *Monsanto* was only with respect to a *price* conspiracy case.

Petitioners have failed to note in their Petition the distinction this Court made in *Monsanto* between price-fixing and *non*-price-fixing cases and the fact that, as this Court noted in *Monsanto*, the question presented there was only "as to the standard of proof required to find a vertical *price-fixing* conspiracy." Quotations from *Monsanto* as presented in the Petition do not make this clear. Quotations in the Petition from some other cases are also confusing. [12]

3. Assuming that the standard of proof in *Monsanto* applies also to a *non*-price conspiracy case, petitioners misconstrue this Court's statement therein that "there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor" (104 S.Ct. 1464, 1473). This Court went on to explain: "That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." (*Ibid.*) Earlier in the *Monsanto* opinion (104 S.Ct. at 1471), this Court explained the same "tends to exclude" language by referring to Judge Aldisert's language in the *Sweeney* case. See pp. 25-26 *supra*. Judge Higginbotham's discussion of burden of proof in this case

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12. The Petition (11) in our case cites *Royal Drug Co., Inc. v. Group Life and Health Insurance Co.*, 737 F.2d 1433, 1438 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 912 (1985) as "relying on *Monsanto* to conclude that in order to 'support a claim of conspiracy . . . there must be evidence that tends to exclude the possibility that [the defendants] were acting independently' " What *Royal Drug* actually stated was: "To support a claim of conspiracy *to maintain resale prices*, there must be evidence that tends to exclude the possibility that Blue Shield and the pharmacies were acting independently." (Emphasis added). The italicized words were deleted and three dots (. . .) were substituted.

(A-14) was in complete accord. Later in his opinion (A-29), Judge Higginbotham stated: "We believe that the plaintiffs have submitted evidence which could lead a jury to believe that the decision to terminate was *not* made *unilaterally* on the part of Ford."

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Haverford, Pennsylvania 19041
Attorney and Counsel of Record
for Respondents

October 23, 1985

RESPONDENTS' APPENDIX

RESPONDENTS' APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.
de la RIGAUDIERE, RICHARD N., and SMITH, DAVID C.,
Appellants

v.

FORD MOTOR COMPANY; FORD MOTOR CREDIT COMPANY; WENNER FORD TRACTOR, INC.; WENNER, JOHN S.; WATSON, JOHN; CRAWFORD, DOUGLAS N.; FRAHER, EUGENE W.; HASEL, E.S.; NICKEL, HUGH; HARRIS, KENNETH E. and WENZEL, C.W.

(D.C. Civ. No. 82-5557)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Present:
HUNTER and HIGGINBOTHAM, *Circuit Judges*
and DEBEVOISE, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 15, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered May 7, 1984 and May 8, 1984, be, and the same are hereby reversed as to Counts

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* Honorable Dickinson R. Debevoise, United States District Court for the District of New Jersey, sitting by designation.

I, II, III and IV. It is further ordered and adjudged that Counts V and VI will be reinstated and that the cause is remanded to the said District Court for trial on all counts. Costs taxed against the appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS
Clerk

May 30, 1985

Costs taxed in favor of appellants as follows:

Docketing Fee	$ 65.00
Appendix	2,151.30
Brief	69.00
Reply Brief	181.99
TOTAL	$2,467.29

Certified as a true copy and issued in lieu of a formal mandate on July 2, 1985.

Test: /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk, U.S. Court of
Appeals for the Third Circuit